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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

CHARLES E. YEAGER et al., Plaintiffs and Appellants, v. CHRISTOPHER ROLIN, Defendant and Respondent.	C083234 and C083830 (Super. Ct. Nos. 34201400169683CUPNGDS, 34201100109638CUPNGDS)

In these two consolidated cases, the trial court found Charles E. Yeager and Victoria Yeager to be vexatious litigants. (*Yeager v. Gibson, et al*. (Super. Ct. Sacramento County, 2014, No. 34201400169683CUPNGDS (*Gibson*); *Yeager v. Lesser, et al*. (Super. Ct. Sacramento County, 2011, No. 34201100109638CUPNGDS (*Lesser*)). In *Gibson*, codefendant Christopher Rolin brought three motions to declare the Yeagers to be vexatious litigants. The trial court granted the third motion by finding the Yeagers had previously filed six qualifying nonmeritorious cases. Thus, the trial court required the Yeagers to post a security to avoid dismissal. The Yeagers did not post the required

security in *Gibson*. Rolin was also a codefendant in the *Lesser* case.[1] In *Lesser*, Rolin also moved to declare the Yeagers to be vexatious litigants. The trial court in *Lesser* granted the vexatious litigant motion by relying on the findings of qualifying nonmeritorious cases made in *Gibson*. The trial court in *Lesser* imposed an identical security requirement. The Yeagers did not post a security in *Lesser* either.

The Yeagers appeal both dismissals of Rolin from *Gibson* and *Lesser*, arguing that (1) the trial court in *Gibson* committed several procedural errors in granting the motion to declare the Yeagers to be vexatious litigants, (2) four of the six cases found to be nonmeritorious litigations by the Yeagers do not actually qualify under the vexatious litigant statute (Code Civ. Proc., § 391),[2] (3) the evidence does not support the trial court's finding that Victoria is a vexatious litigant, (4) the trial court in *Lesser* erred for the same reasons as the trial court in *Gibson*, namely by relying on cases that do not qualify as nonmeritorious litigation under section 391.

We conclude that four of the cases relied upon by the *Gibson* and *Lesser* trial courts do not qualify as nonmeritorious actions under section 391, subdivision (b)(1). Accordingly, we reverse the dismissals.

FACTUAL AND PROCEDURAL HISTORY

The Gibson Case

In October 2014, acting as self-represented litigants, the Yeagers brought an action for malpractice against their prior attorneys: John Gibson, Gibson and Gibson law partnership, Michael Thomas, and Thomas & Associates law partnership. The Yeagers'

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1 None of the other codefendants in *Gibson* or *Lesser* are parties to this appeal.

2 Undesignated statutory citations are to the Code of Civil Procedure.

first amended complaint also named Christopher Rolin as a codefendant for his prior role as their attorney and expert witness.

Rolin's first vexatious litigant motion

Rolin filed a motion to declare the Yeagers vexatious litigants. The trial court denied the motion on grounds Rolin had not met his evidentiary burden.

Rolin's second vexatious litigant motion

When Rolin did not timely file an answer to the amended complaint, the Yeagers moved for entry of default judgment. Default judgment was entered against Rolin on October 20, 2015. Two weeks later, Rolin filed an ex parte application to set aside the default judgment on grounds he had previously filed a second motion to declare the Yeagers to be vexatious litigants. The trial court denied the motion on grounds it should have been brought as a regularly noticed motion under section 473.

Rolin's third vexatious litigant motion

On November 9, 2015, Rolin filed a third motion to declare the Yeagers to be vexatious litigants. Rolin asserted the Yeagers had prosecuted 11 nonmeritorious actions within the meaning of the vexatious litigant statute. Also on November 9, 2015, Rolin filed a motion to set aside the default judgment. The Yeagers opposed the motion. The trial court determined the clerk had erroneously filed the default judgment. The trial court then granted the motion to declare the Yeagers to be vexatious litigants. In granting the vexatious litigant motion, the trial court reviewed all 11 actions and found Rolin had not met his evidentiary burden as to five actions and the following six actions were sufficient to count for vexatious litigant purposes:

1. *Yeager v. Virgin America* (Super. Ct. San Francisco County, 2009, No. CGC 09-495611).

The trial court's order states: "The Court Register of Actions reflects that counsel for . . . Yeager's motion to be relieved as counsel of record was granted by the Court on

October 7, 2010. Self-represented [Charles] opposed the motion to enforce settlement agreement. The action was dismissed by the Court with prejudice, each party to bear his own fees on Aug. 7, 2012."

2. *Yeager v. Virgin America* (Cal. Ct. App. No. A136601).

The trial court's order finds, Rolin "declares that plaintiffs[3] appealed in pro per on Sept. 18, 2012 and the appeal was dismissed. The documentary evidence provided reflects that plaintiffs filed a Notice of Appeal with the SF Superior Court. The Court Docket reflects that plaintiffs are self-represented on appeal. The appeal was dismissed on April 16, 2014 for failure of appellant to file a brief."

3. *Yeager v. Bowlin* (U.S. Dist. Ct. (E.D. Cal.) No. 2:08-CV-00102-WBS-CDK.)

The trial court's order states, Rolin "declares that [the Yeagers] filed their First Amended Complaint in pro per on Dec. 3, 2008 and the appeal was dismissed. The documentary evidence provided reflects that plaintiff Charles Yeager filed the Amended Complaint with the U.S.D.C. in pro per. The Court Docket reflects that Summary judgment was granted in favor of defendant Bowlin and the plaintiffs First Amended Complaint was dismissed and Judgment entered in accord with the Court's order on January 6, 2010."

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3 The trial court in *Gibson* often referred to both Charles and Victoria as plaintiffs in actions for which only Charles was listed as a party – likely because the trial court found for purposes of the vexatious litigant determination that Victoria essentially controlled the litigation on behalf of Charles. In light of our conclusion the *Gibson* and *Lesser* trial court vexatious litigant determinations lack the requisite number of qualifying cases under section 391, subdivision (b)(1), we do not need to parse the nominal plaintiff from the "true" plaintiff(s) behind the relied-upon cases. Accordingly, we quote the trial court orders without correction even though the orders sometimes refer to the Yeagers as "plaintiffs" when only Charles appeared as a party.

4. *Yeager v. Superior Court of Fresno County* (Cal. Ct. App. No. F069172).

The trial court's order states, Rolin "declares that [the Yeagers] filed a writ of mandate in the Court of Appeal[] in pro per on April 8, 2014, and the petition for writ of mandate was denied on April 18, 2014. The documentary evidence provided supports the conclusion that the plaintiffs were self-represented and their writ was denied."

5. *Yeager v. Aviat Aircraft* (U.S. Ct. App. (9th Cir) No. 11-1910.)

The trial court noted, Rolin "declares, and the documents reflect that [Charles] filed a Notice of Appeal from grant of summary judgment by the U.S.D.C., in pro per on Dec. 2, 2011. The Ninth Circuit affirmed the grant of summary judgment for the defendants on Jan. 27, 2014."

6. *Yeager v. Superior Court of Fresno County* (Cal. Ct. App. No. F069141.)

The trial court noted, Rolin "declares that plaintiffs filed a writ of mandate in the Court of Appeal[] in pro per on April 8, 2014, and the petition for writ of mandate was denied on April 18, 2014. The documentary evidence provided supports the conclusion that the plaintiffs were self-represented and their writ was denied."

The Yeagers' motion for reconsideration

Following the granting of Rolin's vexatious litigant motion in *Gibson*, the Yeagers moved for reconsideration. Rolin opposed the motion for reconsideration. The trial court denied the motion and affirmed the original order as to Victoria Yeager in addition to Charles Yeager.

Inadvertent dismissal by the Yeagers

Before the trial court ruled on the motion for reconsideration, the Yeagers filed a request for dismissal of the action with prejudice. The Yeagers' request for dismissal bore the caption "*Yeager v. Luval*" but the case number for the *Gibson* case. The Yeagers moved to set aside the dismissal. The trial court found the Yeagers' dismissal of the action was a mistake and reinstated the case against the Gibson and Thomas defendants.

However, the trial court denied the motion to set aside the dismissal as to Rolin. The trial court found the Yeagers had not posted the $75,000 security required by the ruling on Rolin's vexatious litigant motion.

The Yeagers thereafter timely filed a notice of appeal.

The Lesser Case

In August 2011, acting as self-represented litigants, the Yeagers brought an action for malpractice against their prior attorneys: Don A. Lesser and the Lesser Law Group. In October 2014, the Yeagers amended their complaint to add Rolin as a defendant. Rolin responded by moving to dismiss the operative complaint on grounds the Yeagers had previously been found to be vexatious litigants in the *Gibson* case. The Yeagers opposed the motion to dismiss.

The trial court granted the motion to dismiss Rolin as a defendant. In granting the motion, the trial court in *Lesser* found:

"In a different legal malpractice action brought by the same plaintiffs in pro per (Yeager v. Gibson, et al.), plaintiffs were declared to be vexatious litigants and required to post a $75,000 security in order to proceed with their claims against defendant Rolin in the Gibson case. Plaintiffs failed to post the required security in Gibson, which case was thereafter dismissed as against defendant Rolin." The trial court determined the Yeagers had not brought the *Lesser* action for purposes of harassment or delay. However, the trial court in *Lesser* found that "the [trial court] in Gibson previously determined that plaintiffs have no reasonable likelihood of prevailing on their malpractice claims against defendant Rolin and in opposition to the present motion, plaintiffs have offered no evidence which supports a different outcome to an otherwise identical motion. Therefore, this Court holds that defendant Rolin has carried its burden of showing plaintiffs have no reasonable likelihood of prevailing on their malpractice claims against him. [¶] Given that the Gibson Court concluded the appropriate amount

for the security to be posted by plaintiff was $75,000 and that plaintiffs failed to timely comply with the earlier order but have instead continued their same malpractice claims against defendant Rolin . . . in the present case, this Court will require the same $75,000 security before plaintiffs will be permitted to resume prosecution of the present lawsuit as against Rolin."

The Yeagers did not post the required security and Rolin was dismissed from the case. Thereafter, the Yeagers timely filed a notice of appeal in *Lesser*.

DISCUSSION

I

Gibson Vexatious Litigant Determination

The Yeagers argue that four of the six prior cases relied upon by the trial court in *Gibson* do not qualify as nonmeritorious actions under section 391, subdivision (b)(1). We agree.

A.

Section 391

Section 391, subdivision (b)(1), defines a vexatious litigant as a person who "[i]n the immediately preceding seven-year period has commenced, prosecuted, or maintained in propria persona at least five litigations other than in a small claims court that have been (i) finally determined adversely to the person or (ii) unjustifiably permitted to remain pending at least two years without having been brought to trial or hearing." The intent of the vexatious litigant statute " 'is to address the problem created by the persistent and obsessive litigant who constantly has pending a number of groundless actions and whose conduct causes serious financial results to the unfortunate objects of his or her attacks and places an unreasonable burden on the courts.' " (*In re Kinney* (2011) 201 Cal.App.4th 951, 957–958 (*Kinney*), quoting *Morton v. Wagner* (2007) 156 Cal.App.4th 963, 970-971.)

In this challenge to the trial court's finding the Yeagers have previously prosecuted five or more nonmeritorious actions within the meaning of section 391, we apply the substantial evidence standard of review. "The trial court exercises its discretion in determining whether a person is a vexatious litigant. Review of the order is accordingly limited and the Court of Appeal will uphold the ruling if it is supported by substantial evidence. Because the trial court is best suited to receive evidence and hold hearings on the question of a party's vexatiousness, we presume the order declaring a litigant vexatious is correct and imply findings necessary to support the judgment. (*Bravo v. Ismaj* (2002) 99 Cal.App.4th 211, 219; *Morton v. Wagner*[, *supra*,] 156 Cal.App.4th [at p.] 969.) Of course, we can only imply such findings when there is evidence to support them. When there is insufficient evidence in support of the designation, reversal is required." (*Golin v. Allenby* (2010) 190 Cal.App.4th 616, 636.)

B.

The Six Prior Cases Deemed Qualifying by the Trial Court

Although Rolin submitted 11 prior actions as each qualifying under section 391, subdivision (b)(1), the trial court found that only 6 cases met the definition of a nonmeritorious action.

1. *Motion for Reconsideration*

At oral argument, counsel for Rolin asserted that the trial court's ruling on the motion for reconsideration broadened the number of qualifying cases to eight – i.e., more than the six identified in the trial court's December 18, 2015, order that originally declared the Yeagers to be vexatious litigants. We reject the assertion.

In denying the motion for reconsideration, the trial court stated: "Self-represented Plaintiff Victoria Yeager's Motion for Reconsideration of the Court Order [of Dec. 18, 2015] Declaring Victoria Yeager a Vexatious Litigant is DENIED. The original order is AFFIRMED as to Victoria Yeager in addition to Charles Yeager." (Brackets in original.)

By affirming the original order, the trial court did not supersede its earlier determination that the previously identified six cases qualified to declare the Yeagers to be vexatious litigants.

2. *Summary Denials of Appellate Writ Petitions*

The first two cases relied upon by the trial court involved appellate writ petitions filed by the Yeagers in the California Court of Appeal. Appeals and appellate writs can qualify as nonmeritorious actions under section 391. "The vexatious litigant statutes do not apply solely to the trial courts. Each writ petition and appeal constitutes 'litigation.' " (*Kinney, supra,* 201 Cal.App.4th at p. 958.)

The trial court found two writ petitions filed by the Yeagers to constitute qualifying cases under section 391. The Yeagers filed both writ petitions in propria persona in the Court of Appeal, Fifth District, in case numbers F069141 and F069172.

In case number F069141, the Fifth District summarily denied the writ petition. The Fifth District's order states only that "[t]he petition for writ of mandate and request for stay filed April 2, 2014, is denied." This summary denial of the Yeagers' writ petition does not count as a qualifying nonmeritorious case. "[T]he summary denial of a writ petition does not necessarily constitute a litigation that has been 'finally determined adversely to the person' within the meaning of section 391, subdivision (b)(1)." (*Fink v. Shemtov* (2010) 180 Cal.App.4th 1160, 1172 (*Fink*).) The *Fink* court reached this conclusion based on guidance by the California Supreme Court in *Leone v. Medical Board* (2000) 22 Cal.4th 660 (*Leone*). In *Leone*, "the Supreme Court stated: ' "When the court denies a writ petition without issuing an alternative writ, it does not take jurisdiction over the case; it does not give the legal issue full plenary review." [Citation.]' (*Leone v. Medical Board*, *supra*, 22 Cal.4th at pp. 669-670.) A summary denial of such a writ petition therefore *cannot* constitute a final determination of litigation

within the meaning of section 391, subdivision (b)(1)." (*Fink, supra,* at p. 1172, italics added.)

Likewise, the denial by the Fifth District Court of Appeal of the Yeagers' writ petition in case number F069172 does not count as a qualifying case under the vexatious litigant statute. In case number F069172, the Fifth District denied the writ petition without having issued an alternative writ. Consequently, the denial of the writ petition does not count toward the five prerequisite cases required by section 391 in order to declare a party to be a vexatious litigant. (*Leone, supra*, 22 Cal.4th at pp. 669-670; *Fink, supra,* 180 Cal.App.4th at p. 1172.)

At oral argument, counsel for Rolin argued these summary denials of appellate writ petitions qualified for purposes of the vexatious litigant statute because the Yeagers' writs were the exclusive manner of challenging the underlying order. This argument was not presented in the respondent's brief. This argument was also not presented by Rolin in the trial court. Unsurprisingly, the trial court made no finding that the appellate writs filed by the Yeagers constituted the exclusive manner to challenge the underlying trial court rulings and that the denials constituted dispositions on the merits. Thus, we reject the argument as improperly raised and not supported by requisite factual findings by the trial court.

In sum, we determine both writ petitions filed by the Yeagers in the Firth District Court of Appeal relied upon by the trial court do not qualify under section 391.

3. *Appeal in Yeager v. Virgin*

The third case relied upon by the trial court in declaring the Yeagers vexatious litigants was a direct appeal taken in the matter of *Yeager v. Virgin* (First District Court of Appeal No. A136601). With respect to this appeal, the trial court found the record "reflects that plaintiffs [were] self-represented on [that] appeal . . . ." This was based on an order entered on May 1, 2013, that stated in pertinent part, the "appeal was dismissed

on April 16, 2013, for failure to file an opening brief after notice was given under rule 8.220(a)(1) of the California Rules of Court. Appellant [Charles] was proceeding in propria persona on appeal." However, the record shows the order actually reinstated Charles's appeal. In that order, the First District construed a prior filing by attorney Michael W. Thomas as an indication Yeager *was* represented by counsel.

Upon reinstating the appeal, the First District Court of Appeal noted no further extensions of time would be granted to file the opening brief. Attorney Thomas thereafter filed both an appellant's opening brief and a reply brief on behalf of Charles. On the First District's own motion, it ordered supplemental briefing. Because the supplemental briefing order indicates the issues that would determine the result were substantial, we quote the order at length:

"(1) In this case, Connie Bowlin served and filed a notice of lien as a judgment creditor pursuant to section 708.410 et seq. . . . Section 708.440, subdivision (a) provides in relevant part that 'no compromise, dismissal, settlement, or satisfaction of the pending action . . . or judgment procured therein may be entered into by or on behalf of the judgment debtor, without the written consent of the judgment creditor or authorization by order of the court obtained under subdivision (b).' Subdivision (b) of section 708.440 provides in relevant part that a trial court may authorize a settlement and dismissal upon a noticed motion served upon the judgment creditor. Here, it does not appear that Bowlin, the judgment creditor, either provided written consent to the settlement or received notice of the motion to enforce the settlement. Under these circumstances, did the trial court have authority to approve the settlement and dismiss the action? Further, can the Court of Appeal affirm a judgment of dismissal when the trial court did not comply with section 708.440? (2) Assuming arguendo that respondent were to obtain the judgment creditor's written consent to the settlement while the matter is pending on appeal, can the Court of Appeal consider that fact in ruling on the merits of the appeal?"

Attorney Thomas filed supplemental briefing on behalf of Charles. In short, the evidence in the record does not support the finding Yeager was self-represented in pursuing an appeal in the First District.

4. *Federal Action in Yeager v. Bowlin*

The fourth case determined by the trial court to be a qualifying case under section 391 was the matter of *Yeager v. Bowlin* – an action filed in the United States District Court for the Eastern District of California in case number 2:08-CV-00102-WBS-CDK. In support of its determination this case constituted a qualifying nonmeritorious action, the trial court found that, in *Yeager v. Bowlin*, "[t]he documentary evidence provided reflects that plaintiff Charles Yeager filed the Amended Complaint with the U.S.D.C. in pro per." An examination of the entire docket in *Yeager v. Bowlin*, however, does not support the conclusion Charles prosecuted the matter in propria persona for purposes of section 391.

The district court's docket shows Yeager was represented by attorney Robert Eliason when the complaint was filed in January 14, 2008. Eliason moved to withdraw as counsel in August 2008. Approximately three weeks later, Benjamin L. Pavone substituted in as Charles's attorney. Pavone appears to have served as counsel for only a very short time, after which the district court ordered Charles to file an amended complaint. In December 2008, Charles filed an amended complaint as ordered by the district court. He did so in propria persona. In February 2009, attorney Steven E. McDonald appeared on behalf of Charles.

McDonald filed a second amended complaint on Charles's behalf. This attorney-filed complaint – rather than that filed by Charles – would serve as the operative complaint through the remainder of the case. In December 2009, attorney Donald Lesser associated into the case. At that point, Charles was represented by co-counsel. When the district court granted summary judgment, Yeager was still represented by attorneys

McDonald and Lesser. Attorney Lesser filed a notice of appeal on Charles's behalf. Although McDonald substituted out of the case, Lesser remained on as Charles's attorney.

Although *Yeager v. Bowlin* was ultimately dismissed, it is not dismissed based on the single pleading that Charles filed in propria persona. Instead, that pleading was superseded by the second amended complaint filed by Charles's attorney. Moreover, the docket establishes that Yeager was represented by legal counsel throughout the proceeding with the exception of a single three-month span. Accordingly, the case of *Yeager v. Bowlin* does not meet section 391, subdivision (b)(1),'s definition of a dismissal of an action filed in propria persona.

5. *Conclusion*

Because *Yeager v. Bowlin* does not qualify as a nonmeritorious case under section 391, subdivision (b)(1), no more than two of the six cases relied upon by the trial court are supported by substantial evidence. However, subdivision (b)(1) of section 391 requires at least five qualifying nonmeritorious cases. As a consequence, we conclude the trial court erred in declaring Charles a vexatious litigant.

C.

Victoria Yeager

Even though Victoria was not a named party in some of the six cases deemed to be qualifying nonmeritorious actions under section 391, the trial court nonetheless determined she was a vexatious litigant based on the finding she essentially controlled the cases brought on behalf of Charles. On appeal, Victoria challenges the sufficiency of the evidence of the finding that she drove all of the litigation on behalf of Charles.

The trial court appears to have relied upon the same six cases to determine both Charles and Victoria are vexatious litigants. Our conclusion that no more than two of the cases relied upon by the trial court qualify under section 391 means there are also an

insufficient number of cases to declare Victoria to be a vexatious litigant. (§ 391, subd. (b)(1) [requiring at least five nonmeritorious qualifying cases].)[4]

II

Lesser Vexatious Litigant Determination

In the appeal in *Lesser*, the Yeagers argue the trial court's order must be reversed because it was based on the same six qualifying cases as relied upon by the trial court in *Gibson* (Super. Ct. Sacramento County, 2014, No. 34201400169683CUPNGDS). We agree.

In *Lesser*, the trial court expressly based its vexatious litigant order on the findings made in the *Gibson* case. Specifically, the *Lesser* trial court's order states: "It must be noted here that based on the pleadings, papers and other evidence filed by [the Yeagers] themselves in *Gibson* and in the present action, the claims asserted against defendant Rolin are the same. In its order which declared plaintiffs to be vexatious litigants, the Court in Gibson explicitly found [the Yeagers] had no reasonable likelihood of prevailing on their claims against defendant Rolin for several different reasons including but not limited to [the Yeagers'] failure to demonstrate with competent evidence that defendant Rolin's breach of the standard of care and or that his breach actually and proximately caused any recoverable damages. In opposition to the present motion, [the Yeagers] have offered no evidence which could support a different conclusion here. Accordingly, this Court need not here re-visit the issue of whether [the Yeagers] have a reasonable likelihood of prevailing on their claims as against defendant Rolin." Thus the trial court

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[4] Our conclusion that the record does not support the trial court's findings under section 391 also obviates the need to consider the Yeagers' assertions of procedural error in the trial court's granting of Rolin's vexatious litigant motion.

granted the vexatious litigant motion in *Lesser* even though it found no evidence the Yeagers brought the action for purposes of harassment or delay.

As we explained in part I, the *Gibson* court erred in finding the Yeagers brought more than five prior nonmeritorious cases within the meaning of section 391, subdivision (b)(1). Because the *Lesser* court adopted the *Gibson* court's findings, we reverse the vexatious litigant ruling on the same grounds for both cases.

DISPOSITION

The orders dismissing Christopher Rolin as a defendant in *Yeager v. Gibson, et al.* (Super. Ct. Sacramento County, 2014, No. 34201400169683CUPNGDS) and *Yeager v. Lesser, et al.* (Super. Ct. Sacramento County, 2011, No. 34201100109638CUPNGDS) are reversed. Charles and Victoria Yeager shall recover their costs on appeal. (Cal. Rules of Court, rule 8.278(a)(1) & (2).)

/s/
HOCH, J.

We concur:

/s/
RAYE, P. J.

/s/
ROBIE, J.